United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1140

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B

9/s

DOCKET NO. 76-1140

UNITED STATES OF AMERICA

PLAINTIFF-APPELLEE

V.

DAVID N. BUBAR, ET AL.

DEFENDANT-APPELLANT

BRIEF OF DEFENDANT-APPELLANT ALBERT COFFEY

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18 U.S.C. §371

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. §1952

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to-

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management

establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more and five years, or both.

(b) As used in this section "unlawful activitiy" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

Added Pub. L. 87-228, §1(a), Sept. 13, 1961, 75 Stat. 498 and amended Pub.L. 91-513, Title II, §701(i) (2), Oct. 27, 1970, 84 Stat. 1282.

18 U.S.C. §3481

In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.

CONN. GEN. STAT.

§53a-113. Arson in the third degree

(a) A person is guilty of arson in the third degree if he recklessly causes destruction or damage to a building of his own or of another by intentionally starting a fire or causing an explosion.

(b) Arson in the third degree is a class D felony.

QUESTIONS PRESENTED

1. WHETHER THE IN COURT IDENTIFICATION OF ALBERT COFFEY BY JOHN SHAW WAS THE PRODUCT OF A GRATUITOUS PHOTOGRAPHIC SHOWUP, AGGRAVATED BY AN IMPERMISSIBLY SUGGESTIVE CONVERSATION BETWEEN THE PROSECUTOR AND SHAW, WHICH GAVE RISE TO A VERY SUBSTANTIAL LIKELIHOOD OF IRREPARABLE MISIDENTIFICATION, THUS DEPRIVING COFFEY OF DUE PROCESS OF LAW.

2. WHETHER IN A COMPLEX, MULTIDEFENDANT CONSPIRACY CASE, WHERE THE ENTIRE THEME OF THE U.S. ATTORNEY'S SUMMATIONS IS THE "FAILURE" OF THE DEFENDANTS TO "EXPLAIN" OR "REFUTE" EVIDENCE, THE CONVICTION OF AN APPELLANT AGAINST WHOM THE EVIDENCE OF GUILT IS NOT OVERWHELMING SHOULD BE REVERSED.

    A. WHETHER THE UNITED STATES ATTORNEY'S SUMMATIONS VIOLATED APPELLANT'S CONSTITUTIONAL AND STATUTORY RIGHT TO REMAIN SILENT WITHOUT A PRESUMPTION ARISING AGAINST HIM.

3. DID THE TRIAL COURT'S FAILURE TO CHARGE THE JURY ON THE ELEMENTS OF THE UNDERLYING STATE OFFENSE, IN A FEDERAL "TRAVEL ACT" CASE, CONSTITUTE PLAIN ERROR.

4. WHETHER THE TRIAL JUDGE SHOULD HAVE SEVERED THE CASE OF CODEFENDANT BUBAR FROM THE CASE OF THE APPELLANT COFFEY SINCE THE COURTROOM CONDUCT OF ATTORNEY ZALOWITZ AND BUBAR'S DEFENSE OF PROPHESY INFLAMED, AMUSED AND DISTRACTED THE JURY TO SUCH A DEGREE THAT THE JURY WAS UNABLE TO FOCUS PROPERLY ON THE EVIDENCE.

5. DID THE TRIAL JUDGE ERR IN REFUSING TO PERMIT COUNSEL FURTHER REDIRECT EXAMINATION OF LORETTA MARLEY.

STATEMENT OF THE CASE

On May 8, 1975 a federal grand jury in New Haven returned a twelve count indictment charging Albert Coffey and others with participating in the destruction of a large factory building, Plant No. 4, Sponge Rubber Products Division of Grand Sheet Metal Products, Shelton, Connecticut on March 1, 1975. On September 8, 1975, the Government elected to proceed to trial only on Counts one, two, three, seven, eight and twelve.

On October 6, 1975, jury selection commenced before the Honorable Jon O. Newman, United States District Judge and on October 8, a jury of twelve and four alternates was selected. On October 7 Judge Newman dismissed Count Eight of the indictment upon defendant's motion.

On October 7, 1975, co-defendant John Shaw entered a plea of guilty to Counts One and Two of the indictment and agreed to testify for the Government.

On October 16, 1975, the jury was sworn and the Government called its first witness. On October 21, 1975, Judge Newman denied appellant Coffey's motion to suppress John Shaw's photographic and proposed in court identification of Coffey. (TR. 2409). On December 1, 1975 the Government rested, and the trial judge denied Coffey's motion for judgment of acquittal.

On December 29, 1975, Coffey called one witness and offered certain stipulated testimony concerning Allen Bucan.

On January 7, 1976, Coffey moved for judgment of acquittal on all counts, and the trial judge granted the motion with respect to Count seven.

On January 13, 1976 Judge Newman denied Coffey's motion for acquittal or in the alternative for mistrial based upon the prosecutor's rebuttal summation.

On January 14, 1976, the jury began its deliberations. On January 29, 1976, the jury returned verdicts of guilty on counts one and two and declared that they were deadlocked on counts three and four (formerly Count Twelve). After Judge Newman read the jury an <u>Allen</u> Charge the jury resumed deliberation, and on February 5, 1976, Judge Newman granted Coffey's motion for mistrial on counts three and four.

On March 22, 1976, Judge Newman imposed two consecutive five year terms of imprisonment on counts one and two and denied Albert Coffey's post trial motion for judgment of acquittal and treated the motion as alternatively requesting a new trial. On the same day notice of appeal was filed, and the appellant is presently serving his sentence.

On March 25, 1976 Judge Newman dismissed counts three and four upon the Government's motion.

STATEMENT OF FACTS

On March 1, 1975 Plant No. 4 of the Sponge Rubber Products division of Grand Sheet Metal Products was destroyed by fire at approximately 11:30 P.M. (Tr. 1[illegible]3). An FBI explosives expert, Roger Amrol, testified that high explosive charges and barrels of gasoline had been placed inside the plant and interconnected with detonating cord, and that the gasoline was initiated by explosive charges and detonating cord, thus causing the fire (Tr. 2133).

Co-defendant John Shaw who pleaded guilty to counts one and two of the indictment*/ on October 7, 1975, testified that in exchange for testifying for the Government and entering a plea of guilty to counts one and two of the indictment, exposing him to an aggregate of ten years' imprisonment, the Government promised that he would remain in the Witness Security Program (TR. 2440), that the State of Connecticut would impose a concurrent**/ sentence which would not exceed Judge

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*/ Count one charges conspiracy to violate the Travel Act, 18 U.S.C. §371. Count two charged violation of the Travel Act, 18 U.S.C. §1952.

**/ Shaw had previously pleaded guilty to State of Connecticut arson charges which subjected him to an exposure of twenty years imprisonment.

Newman's eventual sentences, and finally that any federal sentence Shaw might receive in connection with a federal indictment dealing with a 1971 Pittsburgh fire in the Western District of Pennsylvania would be concurrent and not exceed the eventual sentence imposed by Judge Newman (TR. 2442).

According to his own testimony, Shaw's role in the fire was to procure the materials needed to blow up the plant and further to place and set the materials throughout the plant (TR. 2419-2420). The Government's theory was that Coffey was one of three persons who abducted the two guards and boilerman on the night of the fire. Although Shaw never saw any defendant, including Albert Coffey, tie the abducted boilerman, Robert DeJoy, who were all on duty the night of the fire, or blindfold them, or place handcuffs on them, or lead them from the plant (TR. 3291), he testified that Tony Just told him that "they" had taken care of the two guards and were on their way to get the boilerman (TR. 2562).

Of importance to Coffey, Shaw admitted on cross examination to testifying before the grand jury that he didn't see the third one at all, after describing the disguises of co-defendants Ronald Betres and Tony Just (TR. 2749-2750), who according to Shaw were two of the abductors.

Although Coffey stood five feet five and one-half inches tall while wearing one and one-half inch heels or five feet four inches tall without heels and weighed one hundred forty four pounds while fully clothed with a sport coat, pants and shirt and tie (TR. 9936), Roy Ranno, an abducted guard, testified that the three male abductors were five feet ten inches tall and that he gave the FBI the five feet ten inch description for all three abductors within hours after the fire (TR. 4747, 4751). Robert DeJoy, the boilerman, saw two abductors, the first of whom he described as five feet ten to five feet eleven inches tall and weighing two hundred twenty to two hundred thirty pounds. He described the second abductor as heavy set and similar in height to the first abductor (TR. 4756). Al Hanley, the other guard, could not describe the abductors other than the fact that they wore ski masks.

Although Shaw testified that Coffey was present at a noontime meeting with Bubar, Just, Ronald Betres, the Tiches and Shaw at Howard Johnson's in Derby, Connecticut on March 1, the day of the fire (TR. 2521-2522), Robert Brown, the desk clerk at the Holiday Inn in Danbury, Connecticut

some twenty three miles and one-half hour's ride away from Derby (TR. 9934-9935), testified that he saw Coffey, who he had no trouble identifying in the courtroom, between 11:30 A.M. and 12:00 P.M. on March 1st (TR. 4523). Brown further testified that he previously told the police that he had a conversation with Coffey in Danbury between 11:30 A.M. and 12:00 P.M. on the first of March.

Mary Wall, the head housekeeper at the Holiday Inn in Danbury testified that she spoke with Coffey, who she accurately described on the witness stand, at approximately 11:45 P.M. on March first and that Coffey was alone (TR. 10226-10227) in Room 118 at the Holiday Inn in Danbury. John Shaw, who identified the defendant in the courtroom, was the only witness who testified that Coffey was at the plant on the night of the fire, and his in court identification was made after he had been shown two single photographs of the appellant in the FBI office in Pittsburgh on April 10, 1975.

While the Government offered an FBI handwriting expert who testified that Coffey signed a rental receipt in Aetna, Pennsylvania for the truck that transported the explosives to Connecticut, Coffey was never identified by the Avis Rental employee, Ann O'Toole, who effected the transaction. Further there is substantial indication in

the transcript that the jury never resolved the handwriting question. On February 4, 1976, the jury requested to hear the testimony of the handwriting expert as it related to the rental documents (TR. 11280-11283). On February 5, 1976, juror Pond informed the court in chambers in the presence of the appellant and counsel that after yesterday, meaning the 4th of February, he wouldn't "give in to 'em." (TR. 11300)

On January 13, 1976, Judge Newman instructed the jury that the prosecutor's statement that Coffey had not refuted the fact that his handwriting was identified on the Avis Contract (TR 10891) was "improper, uncalled for and illegal" (TR. 10907-10908).

The defendant did not testify and called one witness, Robert Norton, a private investigator, who testified to the distance and driving time between Danbury and Derby, twenty-three miles and one-half hour respectively, and Coffey's height and weight, five feet five and one-half inches and one hundred forty four pounds fully clothed (TR 9934-9936).

ARGUMENT

I. THE IN COURT IDENTIFICATION OF ALBERT COFFEY BY JOHN SHAW WAS THE PRODUCT OF A GRATUITOUS PHOTOGRAPHIC SHOWUP, AGGRAVATED BY AN IMPERMISSIBLY SUGGESTIVE CONVERSATION BETWEEN THE PROSECUTOR AND SHAW, WHICH GAVE RISE TO A VERY SUBSTANTIAL LIKELIHOOD OF IRREPARABLE MISIDENTIFICATION, THUS DEPRIVING COFFEY OF DUE PROCESS OF LAW.

On April 10, 1975, John Shaw, the only witness to place Albert Coffey at the plant on the night of the fire, was interviewed for six hours by the FBI in Pittsburgh, Pennsylvania. (TR. 2740). A specific portion of the interview was devoted to the displaying of photos to Shaw. The FBI took a single photo of Coffey and asked Shaw if he knew or could identify the person in the photograph (TR. 2742). After viewing the single photo of Coffey, Shaw stated he "believe[d] that's Al" and he testified that he was <u>not</u> certain of his identification (TR. 2743). Shaw further testified that he requested to see another photo of the man he referred to only as "Al," which was shown to him, and he again stated that he "believed" that was "Al." (TR. 2743-2744, Hearing Exhibits 40 and 40A).

Subsequently, during the course of the trial, on October 21, 1975, Shaw spoke with Peter Dorsey, the United States Attorney, before taking the witness stand (TR. 2734) and asked Mr. Dorsey if he would be called upon to make an in court identification that day. Mr. Dorsey, according to Shaw, asked Shaw if he would be able to identify anyone whose photo had previously been shown to him, and Shaw answered affirmatively (TR. 2734).

The following morning, October 22, prior to taking the witness stand for the second day, Shaw asked Mr. Dorsey if the defendants were or would be in the courtroom when he [Shaw] would be called upon to make an in court identification, to which the prosecutor answered, "yes". (TR. 2734). The prosecutor's discussion was revealed in this detail during crossexamination of Shaw in front of the jury and after the in court identification of "Al" had been accomplished. (TR. 2646). The prosecutor's colloquy with John Shaw so inextricably linked the two impermissibly suggestive photographic showups of April 10 to the proposed Shaw in court identification of Coffey that the risk of irreparable misidentification became so substantial that Coffey was

denied Due Process of Law. Moreover, had the trial judge known of the full extent of the Shaw - Dorsey identification colloquy as it related to photos prior to the in court identification, he would have been compelled to suppress the proffered in court identification of "Al".[1/]

In Brathwaite v. Manson, 527 F.2d 363, 371 (2 Cir. 1975), cert. granted, 96 S.Ct. 1737 (1976), this Court held that Stovall v. Denno, 388 U.S. 293 (1967), requires that identifications unnecessarily obtained by impermissibly suggestive means must be excluded. Judge Friendly then held that the appropriate test which governs subsequent in court identifications such as that presently at issue is set forth in Simmons v. United States, 390 U.S. 377, 384 (1968).

1/ At the close of the direct examination of Shaw on October 22 the trial judge did learn on voir dire of Peter Dorsey that Mr. Dorsey had informed Shaw on Oct. 21 that the defendants were in the courtroom (TR. 2671) after Shaw had inquired as to whether they would be, when called upon to make an in court identification. The trial judge did not know at that point that Mr. Dorsey had linked the faces in the photographs to the subsequent in court identification and therefore denied defendants' motion for mistrial. (TR. 2690-2691)

The Simmons test requires:

> "that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

390 U.S. at 384. There is no question about the impermissibly suggestive and gratuitous nature of the two photographic showups on April 10, 1975. Regardless of whether an independent basis may have existed upon which Shaw could have relied in identifying Albert Coffey in the courtroom, the colloquy between Shaw and Mr. Dorsey which linked the faces in the two photos of Coffey to the defendants in the courtroom, who Shaw was told would be present before he was asked to make the in court identification, effectively destroyed the reliability of the independent basis[2/] the trial judge had relied upon in denying Coffey's motion to

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2/ Judge Newman initially denied Coffey's motion to suppress when he credited Shaw's testimony that he rode to New York in the same car with "Al" some time after midnight, approximately 1 A.M. or 2 A.M., on the night of the fire. (TR. 2394-2395)

suppress the in court identification (TR. 2409).

Further the risk or likelihood of misidentification in the courtroom was very substantial, since Shaw was not certain of his two prior photographic identifications on April 10, 1975 (TR. 2743), and he had never seen the man he referred to as "Al" prior to March 1, the day of the fire. (TR. 2746-2748).

Finally, Shaw admitted on crossexamination that when he testified before the grand jury he stated that he did not see "the third one [abductor] at all" after describing the disguises of Ronald Betres and Tony Just at the plant on the night of the fire. (TR 2749-2750). In fact the sum total of the description of "Al" Shaw gave the FBI on April 10 was "a short white male" (TR 27-55).

The identification procedure utilized by the FBI on April 10 and by the prosecutor on October 21 and 22, 1975, must be condemned as a violation of due process under Simmons, supra, because on both occasions the Government's conduct was totally unnecessary to a fair resolution of the identity of the abductor Shaw referred to as "Al".

There is no excuse for the photographic showups and absolutely none for the colloquy between Shaw and the United States Attorney whose obligation is to justice. Indeed, the damage was irreparable because it would be impossible to know whether Shaw had an independent basis to refer to other than the photos after his colloquy with the prosecutor. In any event, his prior photo identification was not positive.

Since Shaw was the only witness to place Coffey at the plant on the night of the fire, his identification of Coffey was the single most damaging piece of evidence leading to his conviction on Counts One and Two.

John Shaw's in court identification of Albert Coffey was the product of a gratuitous and impermissibly suggestive photographic showup and colloquy between John Shaw and the prosecutor, which gave rise to a very substantial likelihood of irreparable misidentification and must be condemned as a violation of appellant's right to due process of law under Simmons v. United States, supra. Coffey's conviction on counts one and two must be reversed.

II. IN A COMPLEX, MULTIDEFENDANT CONSPIRACY CASE, WHERE THE ENTIRE THEME OF THE U.S. ATTORNEY'S SUMMATIONS IS THE "FAILURE" OF THE DEFENDANTS TO "EXPLAIN" OR "REFUTE" EVIDENCE, THE CONVICTION OF AN APPELLANT AGAINST WHOM THE EVIDENCE OF GUILT IS NOT OVERWHELMING SHOULD BE REVERSED.

The United States Attorney for the District of Connecticut tried this case himself. He presented over 200 witnesses during a three month trial. Because of the conspiracy charges, all sorts of evidence came in against defendant-appellant Albert Coffey, although the direct proof of his involvement was hardly overwhelming. (See Statement of Facts and Point I, supra.) Yet the theme of the U.S. Attorney's closing addresses was not to marshal the evidence, but to emphasize repeatedly what was not explained, refuted or proved by the defense. Under the circumstances, the total effect of the prosecutor's summation was inexcusable misconduct, for which the only commensurate remedy is reversal.

Before the summations began, Judge Newman addressed himself to all counsel in response to an inquiry by Attorney Sagarin. The court reminded all counsel that "obviously there is a concern about any argument that would seek to have the

jury draw an adverse inference from the defendants['] not taking the stand. . ." A.1; Tr. 10,690 [Reference to "A." pages is to appellant Coffey's separate appendix.] The court was speaking of a suggestion that one defendant's lawyer might need to mention another defendant's failure to testify in order to explain what otherwise might seem a suspicious gap in his own client's defense. Judge Newman contrasted this situation emphatically with that of the prosecutor. The defense lawyer is obviously "not trying to suggest that those who don't take the stand are guilty." A.2; Tr. 10,691. The prosecutor is in a very different position. As Judge Newman put it:

> Anything a prosecutor says in this area could only be said to draw an adverse inference[,] and that's why a prosecutor cannot even put his toe in this particular pond.

Id. These were almost the last words spoken before the United States Attorney finally began his summation to the jury. Unfortunately, he did not take the admonition to heart.

Almost immediately, the prosecutor reminded the jury that the defendant Connors had made pretrial statements, but had not testified at trial. A.4; Tr. 10,733. He found it "interesting," that there was "no contrary testimony" to that

of the FBI laboratory agents. A.5-6; Tr. 10,736-37. He asked the jury "where was there any effort to counter . . . what the Government offered in the way of evidence . . .[,] by which Mr. Moeller might have demonstrated to you that he was trying indeed to hold the customers?" A.7; Tr. 10,752. A few moments later, in mid-argument, the court called a recess. A.8; Tr. 10,761. Counsel for appellant Coffey then registered an objection and made a prompt request, as arguably required by United States v. Nasta, 398 F.2d 283, 285 (2d Cir. 1968), for a cautionary instruction with respect to the defendants' having no obligation to present their own experts. The request was refused. A.10-11; Tr. 10,763-64. The United States Attorney did not take counsel's objection as a warning, however, for he commented again on the defendant Moeller's supposed lack of explanation in his resumed argument. Tr. 10,791. Counsel again requested a curative instruction on burden of proof when the prosecutor concluded, and again the court did not grant the request. A.12-13, 17; Tr. 10,795-96, 99. Counsel for Connors moved at that time for an acquittal on the basis of prosecutorial misconduct. A.16; Tr. 10,798.

Yet none of the previous signals from the judge or counsel had an impact on the prosecutor's approach. Indeed, what might have been naive carelessness in his opening summation became pervasive, purposeful impropriety in his rebuttal.

Perhaps feeling that his case, while long on witnesses, was short on persuasiveness, the United States Attorney seized his opportunity in speaking last to attack all the defendants, whether or not they had taken the stand or offered affirmative evidence, for their supposed "failure" to "explain" or "refute" various points. He began with general, rhetorical requests for "an explanation." See, e.g., A.28-29, Tr. 10,853-54 (P. Betres); A.30-31, Tr. 10,864-65 (Bubar). The transition to direct comment accelerated when the prosecutor declared, "I submit to you that there has been no refutation of the thrust of the government's case insofar as the defendant Bubar is concerned." A.32; Tr. 10,866.

When he came to the next defendant, the prosecutor forged recklessly past the limits of proper argument and then attempted a retreat: "What I'm suggesting to you is that Mr. Connors has not in any way adequately explained away the thrust of the government's case," adding, as if as an afterthought, "as Mr. Golub [Connor's counsel] has made the argument. . ." The same argument was applied to Dennis Tiche,

who testified, see A.36-37; Tr. 10,882-83, and then to Michael Tiche, who did not:

> And the same thing is applicable for Michael Tiche, because in no way has there been any adequate explanation for the existence of that finger-print in the back of the automobile of defendant Bubar.

A.38; Tr. 10,885. Who but Michael Tiche himself could offer that explanation? The prosecutor next turned to Albert Coffey, the appellant:

> Mr. Coffey refers to various testimony, and I would only suggest to you that in no way has he refuted the fact that his handwriting has been identified up there at the Danbury motel . . . Use of a false name. . . at the motel. The use of a false name at the time he was arrested. . .

A. 39; Tr. 10,891. And then immediately Ronald Betres: "Ronald Betres has in no way explained the telephone call made from New Jersey the early morning hours collect to his own phone in Pennsylvania." Id. See also A.34, Tr. 10,872 (many things "missing" from defendant Just); A. 41, Tr. 10,896 ("lack of any explanation from Mr. Bubar").

Both the court and the lawyers realized immediately the gross error and impropriety of the United States Attorney's comments. Without even awaiting requests from counsel, Judge Newman felt obliged to give an instruction on the spot.

The transcript reveals how upset he was, for his caution to the jury did not come out as a model of clarity. A.42-43; Tr. 10,898-99. And he also recognized that more might be required. Id. After giving the jury a recess, the Court invited counsel to suggest further cautionary instructions. Mr. Sagarin, joined by counsel for appellant Coffey and others, moved for acquittal or for a very strong instruction. A.44-49; Tr. 10,900, 10,905. Judge Newman, undoubtedly realizing the message the prosecutor had given the jury, agreed to give Mr. Sagarin's instruction, as amended. A.50; Tr. 10,906. Calling the jury back, Judge Newman told them that:

> to whatever extent the argument of government counsel called upon any defendant to testify or to explain away any evidence, to whatever extent that may have occurred, such argument was improper, uncalled for and illegal.

A. 51-52; Tr. 10,907-08. The degree of the trial judge's concern is reflected in his comment, after denying the motions for acquittal or mistrial, that "If this were a one-day trial, I might, but it's not a one-day trial, so the motions are denied." A.53; TR. 10,909.

The standard for judging prosecutorial misconduct should not be lower after a long trial than after a short one. Indeed,

the potential for abuse is greater the more complicated the charges and the case. See Krulewitch v. United States, 336 U.S. 440, 452-54 (1949) (Jackson, Frankfurter, and Murphy, JJ., concurring). "The naive assumption that prejudicial effects can be overcome by instructions to the jury, . . . all practicing lawyers know to be unmitigated fiction." Id. at 453, (citation omitted). Nor is the standard to be lessened because it is the United States Attorney himself who breaches the standard. Quite the contrary. Berger v. United States, 295 U.S. 78, 88 (1935); United States v. Burse, 531 F. 2d 1151, 1153-55 (2d Cir. 1976).

Appellant Coffey has adopted the arguments of his co-defendants that the prosecutor's comments violated his rights under the Fifth Amendment; see Anderson v. Nelson, 390 U.S. 523 (1968), and Griffin v. California, 380 U.S. 609 (1965); and under 18 U.S.C. §3481, see Wilson v. United States, 149 U.S. 60 (1893). See Point II. A. infra. But even if, despite the repeated and systematic use of the defendants' own names, the jury could have taken the summation as directed solely to counsel's remarks, cf. U.S. ex rel. Satz v. Mancusi, 414 F. 2d 90 (2d Cir. 1969); U.S. ex rel. D'Ambrosio v. Fay, 349 F. 2d 957 (2d Cir.), cert. denied, 382 U.S. 921 (1965), it was still inexcusable misconduct to come so close, so often, so

recklessly, over objection and despite a pointed preargument admonition from the trial judge.

Appellant Coffey was the named victim of the United States Attorney's improper summation only twice. A.5-6, 39. But he was a defendant who did not take the stand, so each of the dozen or more times the prosecutor returned to this theme the prejudice spilled over onto him and was compounded. Moreover, the second reference to the appellant was especially egregious:

> Mr. Coffey refers to various testimony, and I would only suggest to you that in no way has he refuted the fact that his handwriting has been identified up there at the Danbury motel. . . . The use of a false name at the time he was arrested . . . .

A. 39. It cannot seriously be argued that the expressions "his handwriting" or "he was arrested" were references to counsel. Nor could a prosecutor making this argument have thought the jury would differentiate these references from the other "he" in the same sentence, "in no way has he refuted," especially when the expressed referent in the sentence is "Mr. Coffey." The argument had to be an effort at intential comment, or at best it was gross recklessness.[3/]

3/ It should be noted that the same sentence contains an impermissible personal voucher for the truth of the government's evidence: "the fact that his handwriting has been identified." See United States v. Drummond, 481 F.2d 62, 64 (2d Cir. 1973).

As this Circuit has noted, U.S. ex rel. Leak v. Follette, 418 F.2d 1266, 1270 (2d Cir. 1969), some courts have ruled that prosecutorial comment on a defendant's failure to "explain" or "refute" is generally error. See, e.g., Rodriguez-Sandoval v. United States, 409 F.2d 529 (1st Cir. 1969). This Court has indicated that such comment is improper only where the defendant personally would have to testify in order to offer such explanation or refutation. United States v. Dioguardi, 492 F.2d 70, 81-82 (2d Cir. 1974); United States v. Hart, 407 F.2d 1087, 1090-91 (2d Cir.), cert. denied, 395 U.S. 916 (1969); cf. United States v. Cusumano, 429 F.2d 378, 381-82 (2d Cir.), cert. denied, 400 U.S. 830 (1970). No one but Albert Coffey could have "refuted" or explained the "use of a false name ... at the motel" or the "use of a false name at the time he [Coffey] was arrested." A. 39. By referring to the appellant in this way, the United States Attorney called upon the appellant to testify. In the setting of the whole rebuttal, this call was reversible error.

In United States v. Burse, 531 F.2d 1151 (2d Cir. 1976), this Court reversed a bank robbery conviction because

of the closing argument given by the First Assistant U.S. Attorney for the Western District of New York. The opinion enumerates eight factors leading to the reversal. Id. at 1154. Among them were three instances of misstatement of evidence, and assertions by the prosecutor of his own belief in the "truth" of his case. Both errors appear in the government's summations here as well. See, e.g., A. 17-27, 49-50, 56; 39. But the thematic emphasis here on the defendants' "failure" to explain or refute testimony makes the comment condemned in item (c) of Burse, 531 F.2d at 1154, pale by comparison. The trial judge in Burse, like Judge Newman here, obviously declined to grant acquittal or a mistrial on account of the prosecutor's conduct. But this Court in reversing the Burse judgment pointed to the fact that the trial judge "on its own initiative, felt compelled to tell the jury that the prosecution in its closing argument may have" committed improprieties. Id. The same occurred here. A.42-43. Moreover, Judge Newman pointedly admonished the United States Attorney before the arguments began to keep "his toe" out of "this particular pond." A.2.

The principles discussed so recently in Burse show that prosecutorial misconduct of this persistence and

seriousness warrants more than an admonition. The direct evidence against the appellant Coffey was equivocal at best. In a conspiracy case as complex as this one, the jury had enough to do without the added problem of filtering out improper argument. The conviction should be reversed.

A. The United States Attorney's Summations Violated Appellant's Constitutional and Statutory Right to Remain Silent Without a Presumption Arising Against Him.

Appellant Coffey adopts the arguments under the Self-Incrimination Clause and 18 U.S.C. §3481 presented to this Court on behalf of codefendants Anthony Just and others.

III. IN A FEDERAL "TRAVEL ACT" CASE, THE TRIAL COURT'S FAILURE TO CHARGE THE JURY ON THE ELEMENTS OF THE UNDERLYING STATE OFFENSE CONSTITUTES PLAIN ERROR.

In charging the jury on the essential elements of the offense (the "Travel Act"), Judge Newman said that a defendant would not be guilty unless he had "the intent to promote, manage, carry on or facilitate the promotion, management or carrying on of an arson in violation of Connecticut Law." Joint App. Vol. II, at Tr. 10,935. After defining the term "facilitate," he then read the jury the exact language of Conn. Gen. Stat. §53a-113, arson in the third degree, which is a felony under state law:

> I instruct you that a person commits arson in violation of Connecticut law if he recklessly causes destruction of a building of his own or another by intentionally starting a fire or causing an explosion.

Id. There was no further discussion of "arson," and the judge never enumerated its constituent elements. The failure was plain error requiring reversal.

As Judge McCree put it:

> [I]t is the duty of the trial judge "to tell a jury what facts they must find before they can convict -- that is, to

> instruct the jury as to the elements of the crime charges." . . . Ordinarily, it will not suffice merely to read to the jury the statute defining the crime. Even though the language of a statute may expressly contain all the elements of the offense, common English words often will have peculiar legal significance.

United States v. Bryant, 461 F.2d 912,920 (6th Cir. 1972) (citations omitted). This Circuit has consitently found plain error where the trial judge failed to "cover all of [the] elements." United States v. Howard, 506 F.2d 1131, 1133 (2d Cir. 1974). In Howard, although identification was the only real issue, this Court said:

> [W]e do not think it harmless error for a jury to find a man guilty of a federal offense without [the jury's] even knowing what the elements of the offense are.

506 F.2d at 1133-34. See also United States v. Fields, 466 F. 2d 119 (2d Cir. 1972).

This rule is based on the fundamental requirement that the government must prove its case beyond a reasonable doubt. It is not enough for instructions simply to be "clear and understandable" and to "embod[y] the substance of the [underlying state] statutes." United States v. Gerhart, 275 F. Supp. 443, 467 (S.D.W.Va. 1967). Even when an element is clear and not in issue, the failure to place it squarely within that special list of circumstances of which the jury

must find each beyond a reasonable doubt has the effect of an impermissible partial direction of a guilty verdict. United States v. Singleton, 532 F.2d 199, 204-07 (2d Cir. 1976); United States v. Byrd, 352 F.2d 570, 572-74 (2d Cir. 1965).

Under the charge given in this case, the jury need not have found beyond a reasonable doubt that the appellant intended to facilitate the destruction of a building and that he intended the destruction to be caused in a reckless manner and that he intended the destruction to be by fire or explosion and that he intended the fire or explosion to be intentionally started. See Conn. Gen. Stat. §53a-113. Moreover, the terms "recklessly" and "intentionally" are technical terms under Connecticut law, with detailed and formal definitions which are not the same as common English usage. See Conn. Gen. Stat. §§53a-3(11),3(13). The jury needed the court's guidance and did not receive it. The failure to give any charge explaining the mental element of intention led to the findings of plain error in Byrd and Bryant, supra. The considerations underlying those cases apply here and require reversal.

IV. THE TRIAL JUDGE SHOULD HAVE SEVERED THE CASE OF CODEFENDANT BUBAR FROM THE CASE OF THE APPELLANT COFFEY SINCE THE COURTROOM CONDUCT OF ATTORNEY ZALOWITZ AND BUBAR'S DEFENSE OF PROPHESY INFLAMED, AMUSED AND DISTRACTED THE JURY TO SUCH A DEGREE THAT THE JURY WAS UNABLE TO FOCUS PROPERLY ON THE EVIDENCE.

Appellant Coffey joins in and adopts argument of codefendants Just and Peter Betres relying upon the appendix compiled by Attorney Orth, counsel for codefendant Bubar.

V. THE TRIAL JUDGE ERRED IN REFUSING TO PERMIT COUNSEL FURTHER REDIRECT EXAMINATION OF LORETTA MARLEY.

Appellant Coffey joins in and adopts the arguments of codefendant Dennis Tiche.

CONCLUSION

This jury trial spanned a period of three and one half months. The trial's length was a direct result of the Government's decision to try nine defendants together, although the evidence against each was different both in kind and in degree.

Government misconduct prejudiced appellant Albert Coffey on the crucial issue of identification by John Shaw and denied him due process of law. Government misconduct prejudiced appellant Albert Coffey again when the prosecutor improperly commented on Albert Coffey's failure to refute the handwriting evidence offered by the Government.

For these reasons and those additional reasons presented in this brief Albert Coffey respectfully requests that his conviction on counts one and two be reversed or in the alternative that a new trial be ordered.

Respectfully submitted,

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DATE: September 24, 1976

CERTIFICATE OF SERVICE

This is to certify that two copies of the Appellant's Brief and Appendix were mailed to Peter Dorsey, Esq., United States Attorney, 270 Orange Street, Post Office Box 1824, New Haven, Connecticut 06508, this 24 day of September, 1976.

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